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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 79-28

DAVID LAWRENCE BECKLEAN
and
JACK HENRY CORDSEN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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David Lawrence Becklean and Jack Henry Cordsen, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on May 14, 1979.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Missouri (Western Division), attached hereto as Appendix A, is reported in 464 F. Supp. 205.

The opinion of the Circuit Court of Appeals, attached hereto as Appendix B, is as of yet unreported. The order of the Circuit Court of Appeals denying petitioners' motion for rehearing and/or for rehearing *en banc*, attached hereto as Appendix C, is not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 14, 1979 (Appendix B, *infra*). The Circuit Court of Appeals denied petitioners' petition for rehearing and/or rehearing *en banc* (Appendix C, *infra*) on June 7, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Due Process Clause of the Fifth Amendment and Federal Rule of Criminal Procedure 11 require a sentencing court to personally inquire of a defendant as to facts which may indicate that the defendants' guilty plea may not have been knowing or voluntary when the court is informed of facts which cast doubt on the accuracy or the sufficiency of the record at the time the guilty plea was entered?

CONSTITUTIONAL PROVISION AND FEDERAL RULES OF PROCEDURE INVOLVED

The constitutional provision is the Fifth Amendment to the United States Constitution. The Rules of Procedure are Rules 11 and 32 of the Federal Rules of Criminal Procedure. They are printed in Appendix D, *infra*.

STATEMENT

On April 28, 1978, the Grand Jury for the United States District Court for the Western District of Missouri indicted petitioners David Lawrence Becklean ("Becklean") and Jack Henry Cordsen ("Cordsen") on various

charges, including conspiracy (18 U.S.C. §371), mail fraud (18 U.S.C. §1341), wire fraud (18 U.S.C. §1343), and transporting through interstate commerce goods obtained by fraud (18 U.S.C. §2314). Becklean was charged in a total of twenty-six (26) counts and Cordsen was charged in twelve (12) counts.

Soon after the Grand Jury issued its indictment, the government attempted to negotiate with the defendants an "all or none" plea agreement. The basic terms offered were that if Becklean, Cordsen and Kenneth F. Brown (another co-indictee) would each plead guilty to certain counts and exonerate Mark Cello (the final co-indictee), the government would dismiss the remaining counts under the indictment, make no sentencing recommendations, not seek any additional indictments against the defendants relating to other ongoing investigations, and refrain from prosecuting Cello. (Motion Tr. 121-2).[1] However, Brown refused to accept any of these offers and the government refused to negotiate separate agreements with Becklean and Cordsen.

At some point in September, 1978, Brown began cooperating with the government and, therefore, it became clear that any agreement which Becklean and Cordsen could negotiate would no longer require Brown's consent. When Cordsen's attorney found out that Brown had be-

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[1] In an attempt to avoid confusion, Petitioners will differentiate between the different transcripts by reference to each proceeding. Thus, "Plea Tr. 3" refers to page 3 of the September 27, 1978 hearing in which Petitioners entered their guilty pleas. "Sentencing Tr." will refer to the November 20, 1978 proceedings wherein Judge Clark sentenced Petitioners, and "Motion Tr." will refer to the January 9, 1978 hearing on Petitioners' motion to withdraw their guilty pleas.

come a government witness, he contacted a United States Magistrate concerning the possibility of entering a plea.

On September 27, 1978, defense counsel arrived at the Magistrate's office and were informed that Assistant United States Attorney Cynthia Clark had advised the Magistrate that she would not agree to Chief Judge Oliver accepting any plea in this case (Motion Tr. 46-7). At that time, counsel and the Magistrate went to Clark's office to discuss both a possible plea agreement and the Judge before whom they would appear (Motion Tr. 47).

Once the parties began negotiations, the principal areas of discussion were the number of counts to which each defendant would plead guilty, the judge before whom the plea would be entered, and whether formal immunity would be extended with respect to other ongoing investigations (Motion Tr. 115-6). The parties resolved those issues by agreeing that Becklean would plead guilty to fifteen counts, Cordsen would plead guilty to "eight or nine" counts, the pleas and sentencing would be heard by United States District Court Judge Russell G. Clark, all other charges would be dismissed, and, while the government would not grant formal immunity, it was understood that Becklean and Cordsen would not be prosecuted in the future on the basis of other ongoing investigations (Motion Tr. 116). After defense counsel left that meeting, Clark stated to a federal agent present at the meeting that she was going to recommend 30 years (Motion Tr. 117).

After leaving Clark's office, defense counsel met with their clients and informed them of the terms of the plea agreement as offered by the government. Both petitioners were informed by their counsel that one of the terms of the agreement was that the government would make no

recommendation as to sentences (Motion Tr. 16, 38, 48, 53, 62).

Thereafter, Becklean and Cordsen appeared before Judge Clark for the purpose of changing their pleas. Judge Clark first advised Becklean of his rights, and then asked what the plea arrangement was. Ms. Clark advised the Court only that the government agreed to dismiss all other remaining counts against Becklean. When questioned, both Becklean and his attorney agreed that Ms. Clark had correctly stated the agreement. Neither the government, the defendant, nor counsel mentioned anything about sentence recommendations, the decision not to indict Becklean on other charges then under investigation, or that any charges then pending or under consideration against Cello would be dismissed (Plea Tr. 11-12). Subsequently, defense counsel testified that while he may not have mentioned that aspect of the agreement to the court, it was his understanding that as part of the agreement the government would make no recommendations (Motion Tr. 53, 55). Becklean testified that he had been told by his counsel to ". . . come in, answer guilty, whatever I was supposed to, yes, no, don't argue" (Motion Tr. 75). The court then accepted Becklean's plea.

The court then advised Cordsen of his rights and asked whether there was any plea bargain. Again Ms. Clark only mentioned the dismissal of the remaining counts against Cordsen (Plea Tr. 34). Cordsen and his attorney agreed with Ms. Clark's representation (Plea Tr. 34). As in Becklean's case, no mention was made of sentence recommendations, the decision not to indict Cordsen on any of the other cases then being investigated, or of the dismissal of charges against Cello. Cordsen testified that before entering the courtroom he explicitly asked his at-

torney whether the government would make a sentence recommendation and he was told that it definitely would not (Motion Tr. 69-70). He stated that he did not mention it at the hearing because he assumed his attorney was telling the truth and that throughout the negotiations, he was told that there would be no sentence recommendations (Motion Tr. 71). Cordsen then pleaded guilty to eight counts and the court accepted those pleas.

On November 20, 1978, Becklean and Cordsen appeared before Judge Clark for sentencing. The Court asked whether the government had any recommendations. Assistant United States Attorney Clark then recommended that Becklean be sentenced to 25 years confinement and a total fine of Thirty-Five Thousand Dollars ($35,000.00) (Sentencing Tr. 6). Becklean's attorney then protested that it was his understanding that the government would not recommend as to sentence (Sentencing Tr. 7). He specifically informed the court that he had told his client that the plea agreement included no sentence recommendations (Sentencing Tr. 8). He stated, "It puts me in a situation where I have mislead my client, either through my inadvertence or by my misinterpretation of the government's position, or the government changing its position . . . ." *Id.* The sentencing court made no inquiry of Becklean or Cordsen as to their understanding of the bargain, or as to the importance of that element of the bargain to them. Rather, the court simply stated that it was not going to follow that recommendation (Sentencing Tr. 7), and proceeded to sentence Becklean to a total of eight years imprisonment and to fine him Twenty-Six Thousand Dollars ($26,000.00) (Sentencing Tr. 17-8).

The court proceeded to the sentencing of Cordsen. Again Ms. Clark recommended twenty-five years imprisonment and a Thirty-Five Thousand Dollar ($35,000.00) fine (Sentencing Tr. 31). The court sentenced Cordsen to a total of eight years confinement and fines totalling Twenty-Nine Thousand Dollars ($29,000.00) (Sentencing Tr. 33-4). After sentencing, defendants Becklean and Cordsen moved the sentencing court for leave to withdraw their guilty pleas. A hearing on that motion was held on January 9, 1979, and the court denied the motion on January 12, 1979. This appeal followed.

REASONS FOR GRANTING THE WRIT

Rule 11 of the Federal Rules of Criminal Procedure establishes procedures and guidelines for the district courts to follow at the time of acceptance of guilty pleas. That rule is designed to insure that the record as of entry of the plea affirmatively shows that the defendant's decision to plead guilty was made intelligently and knowingly. *McCarthy v. United States,* 394 U.S. 459 (1969). This case presents this Court with the opportunity to establish guidelines and procedures for the sentencing court to follow when information is presented to that court which contradicts or repudiates the testimony or responses on which the defendant's original guilty plea was based. This Court is presented herein with the issue of whether the sentencing court has a responsibility to reinquire of a defendant for the purposes of exploring and reconsidering on the record the apparent discrepancy in order to insure that the guilty plea was in fact knowingly and voluntarily waived.

In *McCarthy v. United States, supra* at 465, this Court set forth the two primary policy bases for the requirement that the district court personally address the defendant: (1) to assist the court in determining that the defendant's decision to plead guilty is both knowing and

voluntary; and (2) to establish a record at that time which affirmatively contains and preserves all of the factors relevant to a determination that the plea was indeed voluntary. *Id.* In *Boykin v. Alabama,* 395 U.S. 238, 242 (1969), this Court held that it was plain error for a state court to accept a criminal defendant's guilty plea without an affirmative showing that the plea was voluntary and intelligent. In *Henderson v. Morgan,* 426 U.S. 637 (1976), this Court held that the failure of the record to affirmatively show that the defendant's guilty plea was voluntarily and knowingly entered entitled the defendant to withdraw his plea. That result was found to be constitutionally required because the record failed to resolve the questions raised, despite the fact that this Court recognized that the defendant would probably have pleaded guilty in any event. *Id.* at 644 n.12. The critical focus on any examination of a guilty plea is whether the record affirmatively shows that the defendant was sufficiently informed of and aware of his rights and that he then voluntarily waived them. Such a record is established through personal interrogation of the defendant by the Court and not through any assumptions that he had been fully and accurately advised by his counsel. "Our cases make it absolutely clear that the choice to plead guilty must be the defendant's: it is he who must be informed of the consequences of his plea and what it is that he waives when he pleads, [citation omitted]; and it is on his admission that he is in fact guilty that his conviction will rest." *Henderson v. Morgan, supra* at 650 (White, J., concurring).

However, despite the dictates of Rule 11, and this Court's holdings, on occasion not all of the factors relevant to an analysis of whether a plea is knowing and voluntary are placed on the record at the time the plea is

entered. Those failures may result from a number of different circumstances. The defendant may have been incompetent at the time he entered his guilty plea, *Suggs v. LaVallee,* 570 F.2d 1092 (2d Cir. 1978), *cert. denied,* ____ U.S. ____, 99 S.Ct. 290 (1979); *Wojtowicz v. United States,* 550 F.2d 786 (2d Cir. 1977), *cert. denied* 431 U.S. 972 (1977); *United States v. Masthers,* 176 U.S. App. D.C. 242, 539 F.2d 721 (1976); the defendant may subsequently deny his guilt, *Griffith v. Wyrick,* 527 F.2d 109 (8th Cir. 1975); or the defendant may be afraid to disclose or be under instructions by his counsel not to disclose on the record his complete understanding of the plea agreement. *United States v. Hammerman,* 528 F.2d 326 (4th Cir. 1975); *United States ex rel. Oliver v. Vincent,* 498 F.2d 340 (2d Cir. 1974). If the sentencing court is placed on notice that such a failure may have occurred, it is under an obligation to reinquire of the defendant as to the possible defect in the previously entered plea and, if the circumstances warrant after full exploration, to provide the defendant with an opportunity to withdraw his guilty plea prior to imposing sentence.

In the instant case, the District Court found that petitioners' counsel informed petitioners that as part of the plea agreement the government had agreed not to make any sentencing recommendations, and that, on the basis of those representations, the petitioners believed at the time they entered their guilty pleas that the government would not make any recommendations as to sentence. Yet, when defense counsel specifically informed the sentencing court that he had misled his client by telling him that the government had agreed not to recommend as to sentences, the district court did not stop and personally inquire of either defendant his understanding of the plea agreement, or of the importance to him of that term.

While the sentencing court had been explicitly informed that the defendants believed that there had been an agreement which differed from that which was revealed at the time the plea was entered, the court simply dismissed the issue and proceeded to sentencing without any attempt to establish the basis for the confusion or the significance of the discrepancy.

This failure is especially egregious in light of the Circuit Court's opinion. The opinion below found that the promise that the government would make no recommendation played no substantial part in petitioners' decision to plead guilty. The court's finding was based on three factors: that the term in dispute was not disclosed to the court at the time the plea was entered; neither defense counsel moved to withdraw the guilty plea after the government made its recommendation; and that neither Cordsen nor his attorney proffered any reason why sentence should not be imposed. Appendix B, *infra,* at 13a. The flaw in this reasoning is the policy behind Rule 11 itself. The Circuit Court erroneously focused on the actions or indications of counsel, not on the understandings or intentions of Becklean and Cordsen. The court found it probative that neither defendant moved to withdraw their guilty pleas without ever establishing that they knew that they could so move. Once the dispute arose, the proceedings should have immediately focused on the defendants' understanding of the agreement and the court should have specifically provided them with an opportunity to withdraw their pleas. "The accused does not have the burden of insuring that his plea is voluntary, that onus rests on the court." *Suggs v. La Vallee,* 570 F.2d 1092, 1117 (2d Cir. 1978), *cert. denied,* ____ U.S. ____, 99 S.Ct. 290 (1979).

The Court below recognized that the sentencing court should have addressed each defendant personally in order to determine their understandings and the importance to them of that agreement. It then stated that the failure to so address the defendants was not error.

Notwithstanding the court's finding, such personal interrogation was not only desirable but required. In *Spradley v. United States,* 421 F.2d 1043 (5th Cir. 1970), the Fifth Circuit held that where the sentencing judge misstated the defendant's parole eligibility at sentencing, the defendant was entitled to withdraw his guilty plea on the grounds that the sentencing judge's comments violated Rule 11 and resulted in a misinformed plea. The court found the sentencing court's error prejudicial despite the fact that at the time the defendant entered his guilty plea the court fully complied with Rule 11 and made no misrepresentations as to possible sentences. *Id.* at 1047; *Gates v. United States,* 515 F.2d 73 (7th Cir. 1973).

In *Moorhead v. United States,* 456 F.2d 992 (3d Cir. 1972), the defendant allegedly made statements contained in his presentence report which were inconsistent with guilt. While the district court had fully complied with Rule 11 at the time the guilty plea was entered, the Third Circuit held that the sentencing court correctly inquired of the defendant whether he made such a statement and whether he wished to withdraw his guilty plea. While that Circuit Court found that the sentencing court was not required to repeat the entire Rule 11 procedure, it properly inquired of the defendant as to the issue in dispute in order to determine if a Rule 32(d) motion to withdraw his guilty plea was in order. *Id.* at 994-5.

Similarly, the Fifth Circuit has held that in a case where there may have been some doubt as to whether the record sufficiently established a factual basis for

the plea when it was entered, the sentencing court properly established such a basis and provided the defendants with an opportunity to withdraw their guilty pleas. *United States v. Gulledge*, 491 F.2d 679 (5th Cir. 1974), *cert. denied* 419 U.S. 849 (1974).

In *Griffith v. Wyrick*, 527 F.2d 109 (8th Cir. 1975), the Eighth Circuit found that the failure of a state sentencing court to personally address a defendant who had previously plead guilty but denied his guilt at sentencing was reversable error. The court held:

> The record must affirmatively show, under the circumstances that the plea of guilty was voluntary, and it is the duty of the judge to establish by inquiry as thorough as the circumstances demand its constitutional validity.

Id. at 112. The Court found that it was the sentencing court's obligation to resolve the doubt cast on the voluntariness of the plea by the petitioner's statements. *Id.* at 111.

The failure of the court below to require the sentencing court to personally question the petitioners, to reconcile the conflict over the terms of the plea agreement underlying the guilty pleas, and provide them with an opportunity to withdraw their pleas, leaves a record which at the time of entry of judgment of conviction does not affirmatively show that Becklean and Cordsen's guilty pleas were voluntary and knowing. That holding creates a direct conflict on a question of both substantial constitutional significance and paramount concern in the administration of the criminal justice system in the federal courts, both of which merit resolution by this Court.

CONCLUSION

On the basis of the foregoing, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 78-00092-01-CR-W-1-3
No. 78-00092-02-CR-W-1-3

UNITED STATES OF AMERICA,
Plaintiff,
vs.
DAVID LAWRENCE BECKLEAN and
JACK HENRY CORDSEN, et al.,
Defendants.

MEMORANDUM AND ORDER DENYING MOTION TO WITHDRAW GUILTY PLEAS

This action came before the Court upon the joint motion of the defendants, David Lawrence Becklean and Jack Henry Cordsen, to withdraw their previously entered guilty pleas. Because of disputed allegations of fact, an evidentiary hearing on defendants' joint motion was held on January 9, 1979. For the reasons stated herein, the motion is denied.

I. INTRODUCTION

Essentially, it is the contention of the defendants that under Rule 32(d), Federal Rules of Criminal Procedure, manifest injustice will result unless the Court permits them to withdraw their previously entered guilty pleas. As basis for their motion, defendants allege that the plea bargaining agreement which was entered into by the de-

fendants and the United States District Attorney was not fulfilled. In particular, defendants allege that an element of the plea bargaining agreement under which they entered their pleas was that the United States District Attorney would not make a recommendation of sentence to the Court at sentencing. It is undisputed that Ms. Clark, Asst. U.S. District Attorney, did make a recommendation to the Court, but a factual dispute as to the exact terms of the agreement necessitated an evidentiary hearing. That issue of fact is resolved in favor of the United States as set forth in the following findings of fact.

II. FINDINGS OF FACT

1. On April 27, 1978, a seventy-one page indictment in forty-eight counts was filed in the United States District Court for the Western District of Missouri. Defendant Becklean was charged in Counts 1-10, 12, 14-18, and 20-29. Defendant Cordsen was charged in Counts 1-3, 6-10, 13, 19 and 27. Three other defendants were also charged in the indictment. These charges alleged violations of 18 U.S.C. §371 (conspiracy to commit offense or to defraud the United States); 18 U.S.C. §1341 (mail fraud statute); and 18 U.S.C. §1343 (wire fraud statute).

2. The Assistant United States District Attorney assigned to the case was Robert B. Schneider who was assisted by Cynthia Clark, also of the U.S. Dist. Attorney's office.

3. In May, 1978, Mr. Schneider recognized that due to the complexity of the case and the multiple defendants and counts, a lengthy trial would be necessitated. What is commonly referred to as a plea bargaining agreement was offered to the defendants. Essentially, that agreement was that if these defendants entered their guilty pleas to the conspiracy count and one count of the mail/wire

fraud, and one other co-defendant entered his plea to Count 29 plus one count of mail/wire fraud, and if the defendants would exonerate the remaining co-defendant upon the record, the United States would agree to the remaining counts, seek dismissal of all counts against the exonerated co-defendant, not pursue an indictment concerning three other "corporate scams", and that at sentencing it would not make a recommendation to the Court as to possible sentences to be imposed.

4. The May plea offer was not accepted by the defendants on the proffered "all or none" basis.

5. In July, 1978, Mr. Schneider told Mr. Duncan, attorney for defendant Cordsen, in response to an inquiry as to a possible plea arrangement that the "stakes had been raised" due to the previously rejected offer and the subsequent time devoted to trial preparation by the U.S. Dist. Attorney's office. Mr. Schneider outlined a second offer which included many of the same elements as the May offer, including the agreement that the U.S. would not make any recommendation at sentencing. However, Cordsen and Becklean would have to enter their guilty pleas to ten counts of the indictment. Again, the offer was rejected by the defendants.

6. Mr. Duncan in his affidavit attached to the defendants' motion states that in regard to these plea agreement offers, the government established cutoff dates after which the offers were terminated.

7. In the latter part of July or the first part of August, Mr. Schneider became involved in another complex criminal action and therefore turned over primary responsibility of the case to Ms. Clark.

8. Mr. David Palladino, an agent for the Federal Bureau of Investigation, testified that he and Ms. Clark worked

daily in her offices throughout the months of July, August, and part of September in preparation for trial. He stated that he recalled one conversation in his presence wherein Ms. Clark told the attorneys for the defendants that the government was "going to trial" on the indictment.

9. Ms. Clark testified that she had told the defendants' attorneys that in regard to the previously extended plea offers that "the deal was off" and "everything is off" and "see you in court".

10. In September, 1978, the attorneys for the defendants and the government conferred concerning another plea arrangement. This discussion involved not only the possible number of counts to which the defendants would enter their pleas of guilty, but also the judge before whom the pleas were to be made.

11. On September 27, 1978, the defendants appeared before this Court and stated their intentions to change their pleas from innocent to guilty on several counts. A transcript of those proceedings was made and is hereby incorporated into these findings of fact.

12. On September 27, 1978, the defendant David Lawrence Becklean appeared with counsel before the Court for the announced intention of changing his plea of innocence on all counts to that of guilty on certain counts. The following transcribed dialogue took place:

THE COURT: Is there any plea bargaining arrangement in this case?

MS. CLARK: Your Honor, only to the extent of the dismissal of the remaining counts of the indictment upon the sentencing of this defendant.

THE COURT: All right. Those counts that would be dismissed are Counts IX, XV and XVIII, is that correct?

MR. COX: There would be 11 counts to be dismissed, Your Honor.

MS. CLARK: He is named in 26 counts of the indictment.

THE COURT: All right. So that is the only agreement, that the balance would be dismissed?

MS. CLARK: That's right.

THE COURT: What motivated the government to arrive at that figure?

MS. CLARK: In the interests of saving the government a lot of money in bringing in suppliers bilked of the money from all over the United States.

THE COURT: Insofar as any plea bargain arrangement, Mr. Cox, has Ms. Clark correctly stated any agreement between defendant and the government?

MR. COX: She has stated it correctly, Your Honor, yes, sir.

THE COURT: On behalf of defendant, what motivated you to agree to that?

MR. COX: Based upon my understanding of the evidence, Your Honor, and discussing the case with the defendant, it was my judgment that this was a proper procedure for this defendant to take and I advised him so and he has decided to do this, Your Honor.

THE COURT: All right.

Mr. Becklean, do you concur with what your attorney has just said?

DEFENDANT BECKLEAN: Yes, Your Honor. [Tr. 12-13]

13. On September 27, 1978, the defendant Jack Henry Cordsen appeared with counsel before the Court for the announced intention of changing his plea of innocence on

all counts to that of guilty on certain counts. The following transcribed dialogue took place:

> THE COURT: Is there any plea bargain arrangement with regard to this defendant?
>
> MS. CLARK: Cordsen is named in 13 counts of the indictment. We have agreed to dismiss the remaining counts after the plea is entered and at the time of sentencing only.
>
> THE COURT: Mr. Duncan, do you agree as to the extent of any plea bargain agreement?
>
> MR. DUNCAN: That is correct, Your Honor, that was the agreement.
>
> THE COURT: Mr. Cordsen, is this your understanding of the agreement?
>
> DEFENDANT CORDSEN: Yes, Your Honor. [Tr. 33-34]

14. On November 20, 1978, both defendants appeared with counsel before the Court for sentencing. Upon inquiry from the Court, Ms. Clark recommended a sentence of "25 years in the penitentiary and pay a $35,000 fine" as to defendant Becklean. The following transcribed dialogue took place:

> THE COURT: Mr. Cox, do you have any statement that you would like to make by way of mitigating any sentence the court might see fit to impose?
>
> MR. COX: At the time of negotiations for the plea, Your Honor, my recollection and Mr. Duncan's possibly is, also, that the government attorney advised that if we would plea guilty there would be no recommendations. Now all of a sudden, I find after we have entered into a plea bargain agreement where we would plead guilty to certain counts and the government, the government would dismiss certain

> counts and there would be no recommendation. But at the time of sentencing there is a recommendation, and I think that if that is the case it casts some serious doubts in my mind concerning this plea, because that was never discussed, never mentioned. In fact, no recommendation, is my recollection of the negotiation. And Mr. Reed was present, Mr. Duncan was present. Maybe my recollection is incorrect. It wasn't written down, it wasn't spelled out. But it concerns me now that at this stage that the government does have a recommendation.
>
> That is prior to any other statement I might have. [Tr. 6-7]

15. Defendant Cordsen and his attorney were present during the sentencing of Becklean and the discussion among the parties concerning the disputed plea bargaining agreement. Defendant Cordsen was sentenced immediately after defendant Becklean. At the time of his sentencing, neither defendant Cordsen nor his attorney, Mr. Duncan, made any effort to withdraw their guilty plea nor in fact were any protests raised in the nature of Becklean's counsel's objections.

16. At the evidentiary hearing on this subject, neither attorney for these defendants testified unequivocally that one of the specific terms of the plea bargain agreement was that the United States would not make a recommendation at sentencing. Rather, both attorneys were of the "impression" that it was still an element of the agreement.

17. The defendants were also of the impression, as conveyed by their attorneys, that the government would not make any recommendations as to possible sentences to the Court.

18. At one time during the period prior to entry of his plea of guilty to some of the charges, defendant Becklean was willing to plead guilty to all of the charges in the indictment.

19. It is the express finding of the Court that the plea bargain agreement under which the defendants entered their pleas of guilty did not contain the agreement that the United States Attorney would not make a recommendation at time of sentencing.

20. The history of plea bargaining negotiations with these defendants was covered in considerable detail during the evidentiary hearing. Based upon that history, the Court finds that the defendants' beliefs that the United States District Attorney would make no recommendation as to sentencing did not play a substantial part in motivating these defendants to enter their pleas of guilty.

21. The undersigned counsel was not influenced even in the slightest degree in determining an appropriate sentence by the recommendation of Ms. Clark. The government requested a twenty-five year sentence and a fine of $35,000. The Court sentenced both individuals to eight year sentences and fines totally $29,000.

III. CONCLUSIONS OF LAW

Defendants' motions and suggestions in support thereof place great reliance upon the decision of *Santobello v. New York,* 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). In *Santobello,* the prosecutor in charge of the case negotiated a plea agreement which included the express agreement that there would be no sentence recommendation by the prosecution. At the time of sentencing, another prosecutor was assigned to the case and did in fact make a recommendation. The Court imposed a

sentence which was identical to that recommended. On certiorari to the United States Supreme Court, the State did not contest the terms of the agreement. Therefore, the Court addressing itself to this crucial stage of criminal procedure stated:

> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a *promise or agreement of the prosecutor,* so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. 30 L.Ed.2d at 433.

In the instant case, the Court makes the express finding that the plea bargaining agreement under which these defendants entered their pleas of guilty did not contain the agreement that the United States would stand mute at sentencing. The misunderstanding, if any, was created by the impressions conveyed by the defendants' attorneys to their clients. Therefore, the legal dictates of *Santobello* are inapplicable.

Nor is this a situation where the sentences should be vacated and the defendants allowed to withdraw their guilty pleas to preserve the integrity of the United States in its dealings with those criminally charged.

The defendants' motion is made pursuant to Rule 32(d), Federal Rules of Criminal Procedure, which states that a motion to withdraw a plea of guilty may be made only before sentence is imposed, but:

> to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

The legal question of whether manifest injustice will result absent permission to withdraw the previously entered plea of guilty is left to the sound discretion of the trial court. *Sherburne v. United States,* 433 F.2d 1350 (8th Cir. 1970). It is a more rigid standard than that utilized if the defendant moves for withdrawal prior to sentencing, for before sentencing:

> the inconvenience to court and prosecution resulting from a change of plea is ordinarily slight as compared with the public interest in protecting the right of the accused to trial by jury. But if a plea of guilty could be retracted with ease *after* sentence, the accused might be encouraged to plead guilty to test the weight of potential punishment and withdraw the plea if the sentence were unexpectedly severe. *Kadwell v. United States,* 315 F.2d 667, 670 (9th Cir. 1963).

In determining whether "manifest injustice" will result, the Court may consider various factors, including the defendant's good faith, credibility, and the weight of defendant's assertions. *Meyer v. United States,* 424 F.2d 1181, 1190 (8th Cir. 1970).

In examining the transcript, the dictates of Rule 11, Federal Rules of Criminal Procedure were followed. The Court directly inquired as to the existence of a plea bargaining agreement and was told that the complete agreement was set forth. Despite the opportunity to do so, the terms of the agreement were not disputed at that time. Mr. Duncan stated at the evidentiary hearing that often the complete terms of the agreement are not set forth to the Court. If this is true, then the dictates of Rule 11 become meaningless. Counsel for defendant could set forth that which they desire to disclose, place their ace up their sleeve to be utilized if disappointed

with sentence, and later disclose their cards and obtain a withdrawal of their plea.

Because this is not a situation where the plea bargaining agreement was not kept by the prosecutor, the sole issue is whether the defendants' counsels false impressions of what were the exact terms of the agreement as conveyed to defendants lead to manifest injustice. Erroneous advice of counsel as to the penalty which could be imposed does not, in and of itself, lead to manifest injustice. *United States v. Scharf,* 568 F.2d 106 (8th Cir. 1978); *United States v. Cravatas,* 330 F. Supp. 91 (D.C. Conn. 1971). If however, the guilty plea is entered into voluntarily solely because of the erroneous advice, or if it plays a *significant* part of the inducement, manifest injustice may result under the circumstances. See *United States v. I.H. Hammerman, II,* 528 F.2d 326 (4th Cir. 1975). Cases of disappointed expectations must be carefully distinguished from those in which the defendant's expectations are predicated upon promises by the prosecutor or statements by the court itself. See *United States v. Crusco,* 536 F.2d 21 (3rd Cir. 1976). Also distinguishable is the situation herein, where the expectation was not as to the severity of the sentence or the prospects of probation but only as to whether the prosecutor would stand mute at sentencing, and the Court was not influenced by the recommendation. No manifest injustice exists herein to be rectified by granting defendants' motion. In conclusion, the Court finds that the defendants have failed their burden on the issue of demonstrating the existence of manifest injustice such as to set aside the judgment of conviction upon their guilty pleas. *Meyer v. United States,* 424 F.2d 1181 (8th Cir. 1970). The defendants' pleas were voluntarily and understandably made after properly being advised of all rights and the

consequences of the plea. Manifest injustice did not result because of the defendants' expectation created by counsel that the government would not make a recommentation of sentence.

Finally, in their motion defendants asserted that one of the co-defendants had become an informer and had "infiltrated the defense". At the hearing this issue was laid to rest by the testimony of the former attorneys themselves, and the Court finds this issue against the defendants.

For the above stated reasons, it is hereby

ORDERED that the motion of the defendants to withdraw their guilty pleas upon vacation of sentences is denied; and it is further

ORDERED that the defendants are to report to the federal institution designated for incarceration at 10:00 a.m. on Tuesday, January 16, 1979.

/s/ Russell G. Clark,

Russell G. Clark, Judge
United States District Court

Dated: January 12, 1979

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 79-1043

UNITED STATES OF AMERICA,
Appellee,
v.
DAVID LAWRENCE BECKLEAN, and
JACK HENRY CORDSEN,
Appellants,
KENNETH F. BROWN and
MARK CELLO.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: March 12, 1979
Filed: May 14, 1979

Before LAY, ROSS and McMILLIAN, Circuit Judges.

LAY, Circuit Judge.

David Lawrence Becklean and Jack Henry Cordsen appeal from an order of the United States District Court, Russell G. Clark, J., denying their motions pursuant to Rule 32(d), Fed. R. Crim. P., to withdraw their guilty pleas and vacate the sentences entered on their pleas.[1] We affirm.

[1]The district court's opinion is reported at 464 F. Supp. 205 (W.D. Mo. 1979).

This case commenced on April 27, 1978, with the return of a 48 count indictment alleging violations of 18 U.S.C. §1341 (mail fraud); 18 U.S.C. §1343 (wire fraud) and 18 U.S.C. §371 (conspiracy). Becklean was charged in 26 counts, Cordsen in 12.

Soon after the indictment was returned the United States Attorney offered defendants a plea agreement. The substance of the agreement was that if Becklean, Cordsen and another codefendant entered guilty pleas to the conspiracy count and one count of mail/wire fraud and exonerated the remaining codefendant on the record, the Government would dismiss the remaining counts, seek dismissal of all counts against the exonerated codefendant, not pursue any further indictments and make no recommendations to the court at sentencing. The offer was further conditioned on all three defendants pleading guilty. The offer was rejected.

Two months later the Government tendered a second offer that contained many of the elements of the first offer, including the provision that the Government would make no recommendation at sentencing. Becklean and Cordsen, however, would have to plead guilty to 10 counts. Again the offer was rejected.

In later July 1978 Robert B. Schneider, the Assistant United States Attorney who had participated in the earlier plea discussions, became involved in another criminal action that required his full attention. The case was then assigned to Cynthia Clark, who up to that time had been assisting Schneider. Ms. Clark continued preparation of the case on a full time basis, with the expectation of going to trial. During that time she advised defense counsel that "all deals were off."

On the morning of September 27, 1978, two days before trial was scheduled to begin, attorneys for Becklean and Cordsen and the Government conferred concerning another plea arrangement. Eventually the attorneys, subject to their clients' approval, agreed that Becklean would enter guilty pleas to 15 counts, Cordsen would enter guilty pleas to eight counts and the remaining counts would be dismissed at the time of sentencing. Defense counsel then met with Becklean and Cordsen to discuss the proposal.

That afternoon Becklean and Cordsen entered their guilty pleas. At the change in plea hearing the court took separately the pleas of Becklean and Cordsen, conducting an inquiry into the terms of any existing plea agreement. For each defendant the court asked the Government what the plea agreement was, and in each case Ms. Clark advised only that the Government agreed to dismiss the counts remaining against each defendant. Each defendand his counsel separately were asked whether or not Ms. Clark correctly had stated the plea agreement. Each replied that she had.[2]

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[2] As set forth in the district court's opinion we think the following dialogue between the court, counsel and the defendants is significant. Concerning Becklean the record reads:

THE COURT: Is there any plea bargain arrangement in this case?

MS. CLARK: Your Honor, only to the extent of the dismissal of the remaining counts of the indictment upon the sentencing of this defendant.

THE COURT: All right. Those counts that would be dismissed are Counts IX, XV and XVIII, is that correct?

MR. COX: There would be 11 counts to be dismissed, Your Honor.

[footnote continued]

On November 20, 1978, Becklean and Cordsen appeared before Judge Clark for sentencing. The Becklean sentencing took place first. The court asked Ms. Clark whether the Government had any recommendation, whereupon she recommended that Becklean be sentenced to 25 years confinement and fined $35,000. Thomas

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MS. CLARK: He is named in 26 counts of the indictment.

THE COURT: All right. So that is the only agreement, that the balance would be dismissed?

MS. CLARK: That's right.

THE COURT: What motivated the government to arrive at that figure?

MS. CLARK: In the interests of saving the government a lot of money in bringing in suppliers bilked of the money from all over the United States.

THE COURT: Insofar as any plea bargain arrangement, Mr. Cox, has Ms. Clark correctly stated any agreement between defendant and the government?

MR. COX: She has stated it correctly, Your Honor, yes, sir.

THE COURT: On behalf of defendant, what motivated you to agree to that?

MR. COX: Based upon my understanding of the evidence, Your Honor, and discussing the case with the defendant, it was my judgment that this was a proper procedure for this defendant to take and I advised him so and he has decided to do this, Your Honor.

THE COURT: All right.

Mr. Becklean, do you concur with what your attorney has just said?

DEFENDANT BECKLEAN: Yes, Your Honor.

464 F. Supp. at 207-08.

The Cordsen colloquy is similar:

THE COURT: Is there any plea bargain arrangement with regard to this defendant?

[footnote continued]

Cox, Becklean's attorney, protested that it was his understanding that the Government would not recommend a sentence. Cox informed the court that he had told his client that the plea agreement included no sentence recommendation and that Ms. Clark's recommendation "puts me in a situation where I have misled my client, either through my inadvertence or by my misinterpretation of the Government's position, or the Government changing its position." Judge Clark stated he was not going to follow Ms. Clark's recommendation. At that time neither Cox nor Becklean moved to withdraw the guilty plea. Becklean was sentenced to eight years imprisonment and fined $26,000.

The court then sentenced Cordsen. Again Ms. Clark recommended 25 years imprisonment and a $35,000 fine. Neither Cordsen nor his attorney made any effort either to protest the Government's recommendation or to withdraw Cordsen's guilty plea. Cordsen was sentenced to eight years imprisonment and fined $29,000.

Two days before defendants were to have commenced serving their sentences the instant motions were filed. Following an evidentiary hearing the court found that the

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MS. CLARK: Cordsen is named in 13 counts of the indictment. We have agreed to dismiss the remaining counts after the plea is entered and at the time of sentencing only.

THE COURT: Mr. Duncan, do you agree as to the extent of any plea bargaining agreement?

MR. DUNCAN: That is correct, Your Honor, that was the agreement.

THE COURT: Mr. Cordsen, is this your understanding of the agreement?

DEFENDANT CORDSEN: Yes, Your Honor.

Id. at 208.

Government had made no agreement concerning sentencing recommendations but that both defendants were under the impression, as conveyed by their attorneys, that the Government would make no recommendations concerning the sentence to be imposed. After examining the history of the plea discussions, however, the court found that defendants' impressions did not play a significant part in motivating defendants' guilty pleas and denied their motions. This appeal followed.

Rule 32(d), Fed. R. Crim. P., provides that a motion to withdraw a plea of guilty after sentencing will be allowed only to correct a manifest injustice.[3] *Meyer v. United States*, 424 F.2d 1181, 1190 (8th Cir. 1970). A defendant seeking such relief bears the burden of proof and resolution of this issue is within the discretion of the trial court, the only issue on appeal being whether that discretion has been abused. *Sherburne v. United States*, 433 F.2d 1350, 1353 (8th Cir. 1970).

The defendants urge their motions to withdraw their pleas are governed by the principles stated by the Supreme Court in *Santobello v. New York*, 404 U.S. 257 (1971). There the Court wrote:

> [W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Id. at 262.

See also United States v. Shanahan, 574 F.2d 1228, 1230 (5th Cir. 1978); *United States v. Miller*, 565 F.2d 1273, 1274 (3d Cir. 1977), *cert. denied*, 436 U.S. 959 (1978). The district court distinguished *Santobello* because the plea agreement under which defendants entered their pleas *did not* contain a provision that the Government would make no sentencing recommendation. The district court found defendants' understanding to the contrary was created by the mistaken impressions conveyed to defendants by their attorneys.

A defense counsel's mistaken representation to a defendant as to what a prosecutor promised may constitute grounds to vacate the plea, notwithstanding the prosecutor's lack of complicity in the mistake, if the representation played a substantial part in inducing the plea. *Cf. McAleney v. United States*, 539 F.2d 282, 286-87 (1st Cir. 1976); *Petraborg v. United States*, 432 F.2d 1194, 1197 (7th Cir. 1970). *See also United States v. Scharf*, 568 F.2d 106 (8th Cir. 1978). The district court found, however, that defendants' understanding did not play a substantial part in their decision to enter guilty pleas.

Defendants contend the district court's finding is unsupported by the record. The district court noted, however, that the dictates of Rule 11, Fed. R. Crim. P., were followed. The district court directly inquired of the existence and contents of a plea agreement. Despite an

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[3] The ABA Standards Relating to Pleas of Guilty, §2.1(a)(ii) (Approved Draft 1968) provide:

> Withdrawal is necessary to correct a manifest injustice whenever the defendant proves that:
>
> (1) he was denied the effective assistance of counsel guaranteed to him by constitution, statute, or rule;
>
> (2) the plea was not entered or ratified by the defendant or a person authorized to so act in his behalf;
>
> (3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed; or
>
> (4) he did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose these concessions as promised in the plea agreement.

opportunity to do so, defendants did not dispute the terms of the agreement as stated by the Government. Moreover, when the court asked the Government for a recommendation and received one, neither defense counsel, both experienced attorneys, moved to withdraw defendants' guilty pleas. It is true that Becklean's attorney protested that he may have misled his client, but no motion to withdraw the plea followed. Cordsen's attorney stood mute. In addition Cordsen and his attorney responded in the negative when asked if there was any reason why sentence should not be imposed.[4]

Defendants contend the fact that they did not respond to the court's inquiry into the terms of the plea agreement is not conclusive. They rely on language in *United States v. Hammerman*, 528 F.2d 326, 331 (4th Cir. 1975):

> At arraignment Mr. Hammerman was asked whether there were any other understandings or commitments by the government. He responded negatively. We have held that even where the answer to such an inquiry denies the very existence of a plea bargain, it is not to be considered conclusive against such claim. We recognized the real possibility that fear that a truthful response might jeopardize the bargain may well produce an answer that is false. *Crawford v. United States*, 519 F.2d 347 (4th Cir. 1975); *Walters v. Harris*, [460 F.2d 988, 993 (4th Cir. 1972), *cert. denied*, 409 U.S. 1129 (1973)].

[4]Cordsen's attorney testified that plea discussions are ongoing, implying that the offer to make no sentencing recommendations included in the first two offers was still part of the deal. The district court found, however, that the Government had established cut-off dates for each of the first two offers, after which they expired. In addition the court found that Ms. Clark had told defendants' attorneys that "any deals were off." Defendants do not challenge these findings.

Nonetheless defendants advance only generalizations concerning why they did not speak up and point to nothing which suggests that the failure to speak up was motivated by a fear of jeopardizing the plea agreement.

In determining whether manifest injustice will result the district court may consider various factors, including defendant's good faith, credibility and the weight of defendant's assertions and those on his behalf. *Meyer v. United States*, 424 F.2d 1181, 1190 (8th Cir. 1970). On this record we cannot say the district court abused its discretion in refusing to permit defendants to withdraw their guilty pleas.[5]

We agree that when counsel for Becklean called the fact to the court's attention, it would have been better for the court to have immediately questioned the defendants personally. Direct interrogation could have been made as to their understanding of the Government's recommendations and whether, notwithstanding the court's intention not to follow them, the recommendations made any significant difference in their plea bargain. Nonetheless, considering the overall circumstances, we find the district court did not abuse his discretion in refusing to set aside the guilty pleas.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[5]The court sentenced defendants on November 20, 1978, and stayed execution of the sentences until January 4, 1979. A motion for an additional stay was denied on December 21, 1978. The defendants did not file the instant motions until two days prior to the time their sentences were to be executed. We likewise note, as did the district court, the great disparity between the Government's recommendations and the sentences and fines actually imposed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1978

No. 79-1043.

UNITED STATES OF AMERICA,
Appellee,

vs.

DAVID LAWRENCE BECKLEAN and
JACK HENRY CORDSEN,
Appellants.

Appeal from the United States District Court
for the Western District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellants and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

June 7, 1979

APPENDIX D

CONSTITUTIONAL PROVISION AND FEDERAL RULES OF PROCEDURE INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put into jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rule of Criminal Procedure Rule 11 provides:

Rule 11. Pleas

(a) ALTERNATIVES. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) NOLO CONTENDERE. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) ADVICE TO DEFENDANT. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) INSURING THAT THE PLEA IS VOLUNTARY. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) PLEA AGREEMENT PROCEDURE.

(1) *In General.* The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) *Notice of Such Agreement.* If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) *Acceptance of a Plea Agreement.* If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) *Rejection of a Plea Agreement.* If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) *Time of Plea Agreement Procedure.* Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) *Inadmissibility of Pleas, Offers of Pleas, and Related Statements.* Except as otherwise provided in this

paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

Federal Rule of Criminal Procedure Rule 32 provides:

Rule 32. Sentence and Judgment.

(a) SENTENCE.

(1) *Imposition of Sentence.* Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. The attorney for the Government shall have an equivalent opportunity to speak to the court.

(2) *Notification of Right To Appeal.* After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(b) JUDGMENT.

(1) *In general.* A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(2) *Criminal forfeiture.* When a verdict contains a

finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

(c) PRESENTENCE INVESTIGATION.

(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

(3) *Disclosure.*

(A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the pre-

sentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

(D) Any copies of the presentence investigation report made available to the defendant or his counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs.

(E) The reports of studies and recommendations contained therein made by the Director of the Bu-

reau of Prisons or the Youth Correction Division of the Board of Parole pursuant to 18 U. S. C. 4208(b), 4252, 5010(e), or 5034 shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) Probation. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation if permitted by law.

(f) Revocation of Probation. The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing.

Supreme Court, U. S.
FILED
AUG 30 1979
MICHAEL RODAK, JR., CLERK

No. 79-28

In the Supreme Court of the United States

OCTOBER TERM, 1978

DAVID LAWRENCE BECKLEAN AND
JACK HENRY CORDSEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

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Attorney
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Washington, D.C. 20530

In the Supreme Court of the United States

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DAVID LAWRENCE BECKLEAN AND
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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 13a-21a) is reported at 598 F. 2d 1122. The opinion of the district court (Pet. App. 1a-12a) is reported at 464 F. Supp. 205.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1979. A petition for rehearing was denied on June 7, 1979 (Pet. App. 22a). The petition for a writ of certiorari was filed on July 7, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the district court's failure to question petitioners at sentencing concerning their understanding of the plea agreement entitled them to withdraw their guilty pleas after their convictions had become final.

STATEMENT

1. A 48-count indictment filed on April 27, 1978, in the United States District Court for the Western District of Missouri charged petitioners and three co-defendants with mail fraud, in violation of 18 U.S.C. 1341, wire fraud, in violation of 18 U.S.C. 1343, interstate transportation of goods obtained by fraud, in violation of 18 U.S.C. 2314, and conspiracy to commit those offenses, in violation of 18 U.S.C. 371.[1] On September 27, 1978, pursuant to a plea agreement, petitioner Becklean entered a plea of guilty to the two conspiracy counts, four counts of mail fraud, eight counts of wire fraud, and one count of interstate transportation of goods obtained by fraud, and petitioner Cordsen pleaded guilty to the two conspiracy counts, one count of mail fraud, four counts of wire fraud, and one count of interstate transportation of goods obtained by fraud. On November 20, 1978, petitioner Becklean was sentenced to a total of eight years' imprisonment, a $26,000 fine, and three years' probation. On that same date, petitioner Cordsen was sentenced to a total of eight years' imprisonment, a $29,000 fine, and three years' probation. Petitioners did not appeal their convictions. On January 2, 1979, petitioners moved to withdraw their guilty pleas pursuant to Rule 32(d) of the

[1]Petitioner Becklean was named in 26 counts, and petitioner Cordsen was named in 12 counts.

Federal Rules of Criminal Procedure. The district court denied the motion after an evidentiary hearing (Pet. App. 1a-12a), and the court of appeals affirmed (Pet. App. 13a-21a).

2. In May 1978, Assistant United States Attorney Robert B. Schneider offered petitioners a plea bargain under which, if they and co-defendant Kenneth Brown would each plead guilty to one count of conspiracy and to one count of either mail fraud or wire fraud, and if these three defendants would exonerate co-defendant Mark Cello, then the government would seek dismissal of the remaining counts against petitioners and Brown and all counts against Cello, would make no sentencing recommendation, and would not prosecute petitioners for other schemes to defraud. The offer was not accepted (Pet. App. 2a-3a, 14a). In July 1978, the prosecutor offered a second bargain that contained many of the terms of the first offer, including the provision that the government would make no recommendation at sentencing.[2] Petitioners and Brown rejected this offer as well (*id.* at 3a, 14a). Both of these offers by the government had cutoff dates after which they terminated (*id.* at 3a, 20a).

In late July or early August 1978, the case was reassigned to Assistant United States Attorney Cynthia Clark, who spent the next two months preparing for trial. During that time, she advised defense counsel that the government was "going to trial" on the indictment and that "the deal was off" on any previously extended plea offers (Pet. App. 4a, 14a, 20a). On the morning of September 27, 1978, two days before trial was scheduled to begin, the government and counsel for petitioners

[2]Under this agreement, however, petitioners and Brown would have had to plead guilty to 10 counts (Pet. App. 3a, 14a).

discussed another plea agreement under which Becklean would plead guilty to 15 counts and Cordsen to eight counts, and the government would seek dismissal of the remaining counts. That afternoon, after approving the proposal, petitioners entered their guilty pleas (*id.* at 4a, 15a).

During the course of the guilty plea proceeding required by Rule 11 of the Federal Rules of Criminal Procedure, the district court inquired into the existence and terms of the plea agreement. The court asked Assistant United States Attorney Clark what the plea agreement was for each of the petitioners, and in each case she responded only that the government had agreed to dismiss the remaining counts in exchange for the pleas; no mention was made of any agreement by the government not to recommend a sentence. Upon separate inquiry, each petitioner and his counsel stated that the Assistant United States Attorney had correctly presented the plea agreement (Pet. App. 15a).[3] The court then accepted petitioners' guilty pleas.

On November 20, 1978, petitioners appeared before the district court for sentencing. When the court asked ASUA Clark whether the government had any recommendation, she recommended that petitioner Becklean be sentenced to 25 years' imprisonment and a $35,000 fine (Pet. App. 6a, 16a). Becklean's attorney then stated that he had understood the plea agreement to preclude the government from making a sentencing recommendation, that he had so informed Becklean, and that the government's recommendation put him "in a situation where [he had]

[3]The pertinent colloquy is set forth in the opinion of the district court (Pet. App. 4a-6a) and the court of appeals (*id.* at 15a-17a n.2).

misled [his] client, either through [his] inadvertence or by [his] misinterpretation of the Government's position, or the Government changing its position" (*id.* at 17a). The court stated that it was not going to follow the government's recommendation (*ibid.*). Neither Becklean nor his attorney moved to withdraw the plea at that time, and Becklean was sentenced to a total of eight years' imprisonment and a $26,000 fine (*id.* at 8a, 17a). When AUSA Clark made the same sentencing recommendation as to Cordsen, neither Cordsen nor his attorney, both of whom had been present during Becklean's sentencing, protested in any way or moved to withdraw the plea, and they both responded in the negative when asked by the court if there was any reason why sentence should not be imposed. Cordsen was then sentenced to a total of eight years' imprisonment and a $29,000 fine (*id.* at 8a, 17a, 20a).

3. On January 2, 1979, two days before their sentences were to commence, petitioners moved to withdraw their guilty pleas on the ground, *inter alia*, that the government had breached the plea agreement by making a recommendation as to sentence. Following an evidentiary hearing held on January 9, the district court denied the motion by written memorandum dated January 12. The court found that although petitioners and defense counsel were of the "impression" that the government would make no sentencing recommendation, the plea agreement did not in fact contain that provision (Pet. App. 7a-8a). Moreover, based upon "[t]he history of plea bargaining negotiations," the court also found that petitioners' mistaken beliefs in that regard "did not play a substantial part in motivating [them] to enter their pleas of guilty" and that the court in imposing sentence "was not influenced even in the slightest degree" by the government's recommendation (*id.* at 8a). Accordingly,

the court concluded that "[n]o manifest injustice exists herein to be rectified by [petitioners'] motion" (*id.* at 11a). The court of appeals, accepting these findings of fact, affirmed the district court's refusal to set aside petitioners' guilty pleas (*id.* at 18a-21a).

ARGUMENT

Petitioners argue that because information was presented at sentencing that "contradict[ed] or repudiate[d] the testimony or responses on which the [petitioners'] original guilty plea was based" (Pet. 7), the district court had an obligation at the sentencing hearing to explore on the record whether the pleas were knowingly and voluntarily entered, as required by Rule 11 of the Federal Rules of Criminal Procedure. See *McCarthy* v. *United States*, 394 U.S. 459, 465 (1969). This argument is unavailing here and does not justify the Court's review of this case.

We note at the outset that petitioners did not appeal the judgments of conviction entered against them on November 20, 1978. Instead, they allowed those judgments to become final, and, after the time for appeal had run, sought to obtain vacation of their convictions by means of a Rule 32 motion. The motion thus constituted a collateral attack on their convictions and ought properly be judged under the standards applicable to motions brought under 28 U.S.C. 2255. Collateral relief from a conviction following a guilty plea is not available for technical defects in the proceedings leading to acceptance of the plea and imposition of sentence, but must instead be predicated upon a showing either that the plea was not knowing and voluntary, and was therefore constitutionally defective, or that there existed some other error causing "special prejudice to the defendant" (*United States* v. *Timmreck*, No. 78-744 (May 21, 1979), slip op. 3) and

"inherently result[ing] in a complete miscarriage of justice, * * * [or] inconsistent with the rudimentary demands of fair procedure." *Hill* v. *United States*, 368 U.S. 424, 428 (1962). In this case, the factual findings of the district court supported its conclusion that there was no miscarriage of justice concerning petitioners' convictions.

The district court fully observed the requirements of Fed. R. Crim. P. 11. At the time petitioners' pleas were entered and accepted on September 27, 1978, "the dictates of Rule 11 * * * were followed. The Court directly inquired as to the existence of a plea bargaining agreement and was told that the complete agreement was set forth. Despite the opportunity to do so, the terms of the agreement were not disputed at that time" (Pet. App. 10a). It was only at sentencing on November 20, 1978, that the alleged inconsistency arose.

Moreover, the district court did not err in the circumstances of this case in imposing sentence upon petitioners and in thereafter refusing to vacate their pleas. As the court of appeals noted (*id.* at 21a), once the allegations regarding the plea agreement came to light, "it would have been better for the court to have immediately questioned [petitioners] * * * as to their understanding of the Government's recommendations and whether, notwithstanding the court's intention not to follow them, the recommendations made any significant difference in their plea bargain." However, as the court of appeals also observed (*id.* at 20a; footnote omitted):

> [W]hen the court asked the Government for a recommendation and received one, neither defense counsel, both experienced attorneys, moved to withdraw [petitioners'] guilty pleas. It is true that Becklean's attorney protested that he may have misled his client, but no motion to withdraw the plea

followed. Cordsen's attorney stood mute. In addition Cordsen and his attorney responded in the negative when asked if there was any reason why sentence should not be imposed.

In these circumstances, the district court had little reason to question the voluntariness of petitioners' pleas.

Furthermore, the district court conducted an evidentiary hearing on petitioners' motion to withdraw their pleas. The court recognized as a general proposition (Pet. App. 11a) that if a "guilty plea is entered into voluntarily solely because of the erroneous advice [of defendant's counsel], or if it plays a *significant* part of the inducement, manifest injustice may result under the circumstances" (emphasis in original). See also *id.* at 19a. However, the district court specifically found in this case that the plea agreement did not bar the government from recommending sentence, that petitioners' erroneous belief to the contrary did not play a substantial part in motivating them to enter their pleas of guilty, and that the government's recommendation did not in the slightest influence the sentence imposed by the court (*id.* at 7a-9a).[4] These findings, which were accepted by the court of appeals (*id.* at 18a-21a) and are not challenged by petitioners in this Court, adequately sustain the conclusion that no manifest injustice is present here. Given the unusual circumstances of this case and the dispositive

[4]Although the government recommended sentences of 25 years' imprisonment and fines of $35,000, the court sentenced petitioner Becklean to eight years' imprisonment and fines of $26,000, and petitioner Cordsen to eight years' imprisonment and fines of $29,000 (Pet. App. 8a, 21a).

factual determinations by the courts below, further review by the Court is unwarranted. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]The court of appeals' decision does not raise a conflict in the circuits. The cases cited by petitioners (Pet. 11-12) are inapposite here since they pertain to instances where the trial court failed to comply with proper procedures in accepting the plea, where the defendant in entering a guilty plea was misled by the trial judge or the prosecutor, or where the defendant affirmatively contradicted the basis for his guilty plea. Moreover, in none of these cases did the district court make factual findings that the defendant's plea was voluntary and not substantially induced by mistake.

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